Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79- 79-5032

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EDDIE SPRAGGINS, :

Petitioner, :

-against- :

STATE OF GEORGIA, :

Respondent. :

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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July 6, 1979

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Petitioner Eddie Spraggins prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia affirming his sentence to death for murder.

OPINION BELOW

The judgment of the Supreme Court of Georgia is reported at 252 S.E.2d 620 (1979), and is attached as Appendix A hereto.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on February 6, 1979. On April 30, 1979, Mr. Justice Powell signed an order extending Petitioner's time for filing a petition for writ of certiorari to and including July 6, 1979. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

In Gregg v. Georgia, 428 U.S. 153 (1976) the Court stated that the constitutional concerns expressed in Furman v. Georgia, 408 U.S. 238 (1972), which resulted in the invalidation of Georgia's death penalty statute, could be met by a carefully drafted statute that ensures that the sentencing authority's discretion is suitably directed and limited so as to minimize the risk of arbitrary and capricious imposition of the death sentence. The Court then ruled that the procedures adopted in Georgia's amended death penalty statute created a constitutional system with safeguards to ensure against a jury's arbitrary and capricious infliction of the death sentence.

This case raises the question whether the Georgia death penalty statute, though capable of constitutional construction, has been interpreted and applied in such a way that the safeguards against random and arbitrary action are ineffective to meet the constitutional objections raised in Furman and restated in Gregg. Specifically this case presents the following questions:

1. Whether the judge's written instructions to the sentencing jury violated the Eighth and Fourteenth Amendments by effectively precluding consideration of mitigating circumstances because they failed to state that even if the jury found aggravating circumstances, a life sentence could be imposed.

2. Whether the judge's written instructions to the jury violated the Eighth and Fourteenth Amendments by effectively precluding consideration of mitigating circumstances

because they failed to state that the jury should consider the mitigating circumstances presented by the evidence in determining the appropriate sentence?

3. Whether the jury's consideration of inflammatory evidence without the guidance of judicial standards deprived petitioner of the circumscribed sentencing procedure recognized in Gregg to be required by the Eighth and Fourteenth Amendments?

4. Whether the automatic appellate review provided by statute was adequate to ensure against the random, arbitrary and unconstitutional imposition of the death penalty?

5. Whether the statutory aggravating circumstance which served as the basis of petitioner's death sentence is unconstitutionally broad and vague as applied because it would support imposition of the death sentence in any murder case and because it places a premium on inflammatory evidence?

6. Whether the second jury's consideration of an aggravating circumstance which was not established in the first trial violated the Fifth Amendment's ban against double jeopardy?

7. Whether petitioner was denied due process of law when the prosecution was permitted to submit proof to the jury on the existence of an additional aggravating circumstance?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This cause involves the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This cause also involves the following statutes of the state of Georgia, included as Appendix B hereto: Ga. Code Ann. §§27-2206; 27-2503; 27-2534.1; 27-2537.

STATEMENT OF FACTS

Petitioner is a 34 year old man. His intellectual range has been diagnosed as that of mild mental retardation. He left school after eighth grade, having failed every course he ever took, and is--and apparently always has been--functionally illiterate.

On March 1 and 2, 1977, petitioner was tried and found guilty of the rape and murder of Frances Coe, a fifty-five year old neighbor, on January 31, 1977. Petitioner was sentenced to death for the murder, upon the jury's finding that a statutory aggravating circumstance, i.e. the rape of the victim, existed. Ga. Code Ann. §27-2534.1.

The evidence upon which the jury made its determinations is summarized in the Georgia Supreme Court's review of that trial at 240 Ga. 759, 243 S.E. 2d 20,22 (1978) (Appendix C hereto) and included the following: (i) an unsigned confession (Tr.-1 at 55) which was repudiated by Petitioner on the stand (Tr.-1 at 114); * (ii) testimony by the doctor who performed the autopsy on the victim that some of the injuries were consistent with those associated with sexual relations (Tr.-1 at 70,71); (iii) detailed descriptions of the wounds and condition of the victim's body, including photographs graphically depicting those descriptions (Tr.-1 at 69-73, 40-41, 93,94); (iv) testimony that the petitioner could never learn in school (Tr.-1 at 103,104,111), could not read (Tr.-1 at 104) and was heavily drinking the night of the murder (Tr.-1 at 112).

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* Throughout this petition, references to the transcript of the lower court in the 1977 trial will be designated as "(Tr.-1 at _____)."

On appeal of the conviction and sentence to the Supreme Court of Georgia, that court, on February 21, 1978, affirmed the convictions for murder and rape, but reversed as to the death sentence for murder (Appendix C). Spraggins v. State, 240 Ga. 759, 243 S.E. 2d 20 (1978) (hereinafter, "Spraggins I"). The grounds of the reversal were that:

> The [trial] court's sentencing instructions failed to make clear to the jury that they could recommend a life sentence even if they found the existence of a statutory aggravating circumstance (Fleming v. State, 240 Ga.142(7), 240 S.E. 2d 37 (1977), and failed to inform the jury that they were authorized to consider mitigating circumstances in contravention of requirements laid down in Code Ann. §§27-2534.1 (b) and 27-2534.1(c), Hawes v. State, 240 Ga. 327 (9), 240 S.E. 2d 833 (1977).

243 S.E. 2d at 23.

The retrial of the sentencing portion of petitioner's case took place on May 22, 1978. At that trial, the prosecutor, seeking the death penalty, attempted to demonstrate the existence of two aggravating circumstances (Tr.-2 at 74-75).* The first aggravating circumstance with which the prosecution was concerned was the rape of the victim; the second aggravating circumstance, about which the jury in the first trial was not charged at all, was that the murder was "vile, horrible, and inhuman in that it involved torture, depravity of mind or an aggravated battery." (Tr.-2 at 75).

The direct evidence presented by the prosecution dwelled on the mutilated state of the victim's body and was heavily constituted by oral descriptions or authentication of photographs of the body, subsequently admitted into

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* Throughout this petition, references to the transcript of the lower court in the 1978 trial will be designated as "(Tr.-2 at _____)."

evidence.* On Petitioner's behalf, his sister testified (Tr.-2 at 207-223) and he also took the witness stand (Tr.-2 at 225-261). Three exhibits were introduced by Petitioner: school reports indicating that Petitioner failed every course he ever took in school and was passed only for social reasons (Tr.-2 at 211); a report from a psychiatrist of the Central State Hospital in Milledgeville, Georgia, diagnosing Petitioner as having mild mental retardation (this document had been stipulated into evidence at the special sanity hearing prior to Petitioner's first trial); and a psychiatric evaluation by a psychiatrist at The Bradley Center, Columbus, Georgia, diagnosing Petitioner as "functioning intellectually in the range of mild mental retardation."

At the close of evidence and summation, the jury was charged orally and in writing. The oral charge (Appendix D, hereto) generally instructed the jury that in determining a sentence, they were authorized to consider all circumstances in aggravation or mitigation. They were informed that they should look for specific statutory aggravating circumstances suggested by the evidence and that the presence of such circumstances could warrant a sentence of death. The judge also instructed that even if aggravating circumstances existed, a life sentence could be recommended.

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* The prosecution called ten witnesses. Six of those witnesses, whose direct testimony constituted about forty-eight pages of transcript out of a total of approximately fifty-six pages of prosecution witnesses' direct testimony, either authenticated photographs taken of the body or orally described the condition of the body. Highly detailed descriptions of the wounds were given by both the chief investigator, Bert Davis (Tr.-2 at 130,131) and the coroner, Dr. Byron Dawson (Tr.-2 at 174-178).

The written charge (Appendix E, hereto) was presented to the jury in this way: "Now, ladies and gentlemen of the jury a list of those aggravating circumstances that the State contends exist in this case are listed on a piece of paper and will be out with you [the jury] in the jury room during your deliberation." (Tr.-2 at 298). This document, entitled "Punishment Charge," did not instruct the jury that they were authorized to consider mitigating circumstances and did not say that even if aggravating circumstances were present, a life sentence could be imposed.

After deliberation, the jury returned with a sentence recommending death. Petitioner appealed the death sentence to the Supreme Court of Georgia, where the sentence was affirmed in Spraggins v. State, ____ Ga.____, 252 S.E. 2d 620 (1979) (hereinafter, "Spraggins II"). This petition for certiorari derives from that judgment.

HOW THE FEDERAL QUESTIONS WERE RAISED

The mandatory death sentence review, which must be undertaken pursuant to statute, Ga. Code Ann. §27-2537, by definition comprehends review of and decision on the constitutional questions raised by the facts in this case. Particularly the Georgia Supreme Court considered:

1. Whether the sentencing instructions, as provided for in Ga. Code Ann. §27-2534.1(b) were subject to such defects as to prevent the jury's consideration of mitigating circumstances. Spraggins II, 252 S.E. 2d at 622. Although no specific reference to federal law was made in this determination, the Georgia Supreme Court reviewed the sentencing

instructions by following the reasoning in two Georgia cases, Fleming v. State, 240 Ga. 142, 240 S.E. 2d 37 (1977) and Hawes v. State, 247 Ga. 327(9), whose foundations are explicitly and indissolubly welded to constitutional principles and decisions articulated by this Court. Therefore, the Georgia Supreme Court's determination in this regard is necessarily a matter of federal law.

2. Whether in light of the evidence and circumstances of the trial, the jury's sentence of death was imposed under the "influence of passion, prejudice, or any other arbitrary factor" (Ga. Code Ann. §27-2537(c)(1)) in such a way that it would violate the Petitioner's constitutional guarantee to a sentencing trial which is not capricious or arbitrary.*

3. Whether the aggravating circumstance found present by the sentencing jury satisfied constitutional standards of preciseness and objectivity. Because this Court has explicitly put the Georgia Supreme Court on notice that the seventh aggravating circumstance in the state's capital sentencing scheme (Ga. Code Ann. §27-2534.1(b)(7)) may be unconstitutional for lack of definition, Gregg v. Georgia, 428 U.S. at 201, it must be assumed that in upholding the jury here, the Georgia Supreme Court decided that the statutory clause is constitutional.

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* This Court's decision in Gregg v. Georgia, 428 U.S. 153, 204-207 (1978) makes clear that this feature of Georgia's capital sentencing review scheme so protects a defendant's rights. Examination of those factors which have influenced the jury thus has a federal constitutional dimension.

REASONS FOR GRANTING THE WRIT

This Court has recognized the unique and awesome nature of the State's power to determine whether a human life should be taken or spared. Because of the absolute and irreversible impact of this determination, this Court has mandated that the death penalty may be constitutionally imposed only under procedures that ensure that the State's power to decree death is not wantonly and capriciously exercised.

Petitioner was denied the protection of those procedural safeguards declared by this Court to be constitutionally required. The sentence of death, imposed by a jury that was improperly instructed, prejudiced by inflammatory evidence and applying an inadequately defined statutory standard, constitutes cruel and unusual punishment. Petitioner's rights under the Fifth, Eighth, and Fourteenth Amendments were violated in these proceedings.

1. THE WRITTEN CHARGE OF THE TRIAL JUDGE EFFECTIVELY NULLIFIED THE JURY'S CONSIDERATION OF MITIGATING CIRCUMSTANCES

A. The Written Charge of the Trial Judge Failed to Inform the Jury that Even If They Found Aggravating Circumstances, They Could Recommend a Life Sentence.

As directed by statute the sentencing trial judge in this case provided the jury with a written charge to be taken into the jury room. Ga. Code Ann. §27-2534.1(c).*

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* The first sentence of §27-2534.1(c) reads:

> "The statutory instruction as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation."

This written charge set forth two options which the jury might have selected after deliberation. The first option was stated as follows:

> If you find that there was one or more of these aggravating circumstances [listed immediately above in the charge] established beyond a reasonable doubt, you may fix punishment at death.

The second option contained in the charge was:

> If you do not find that there was one or more aggravating circumstances, then the form of your verdict would be, "We, the Jury, fix punishment at life."

Petitioner submits that by limiting the jury to these two options, the judge eliminated the possibility that the jury would consider mitigating circumstances and recommend a life sentence, even if aggravating circumstances were present.

In the five death sentence cases decided by this Court in July, 1976, a consistent theme was that state death statutes must establish a scheme that allows the jury to consider and evaluate freely all mitigating circumstances in passing sentence.* The Court's more recent decision in Lockett v. Ohio, 438 U.S. 586 (1978), affirms that principle. At various places throughout these decisions, this Court approvingly referred to the Georgia statute, Code Ann. §27-2539.1, as exemplifying a state statute which comprehends the necessity of allowing the trier of fact to consider all

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* Gregg v. Georgia, 428 U.S. 153; Proffitt v. Florida, 428 U.S. 242; Jurek v. Texas, 428 U.S. 262; Woodson v. North Carolina, 428 U.S. 280; Roberts v. Louisiana, 428 U.S. 325.

mitigating circumstances.* See, e.g., Lockett v. Ohio, 538 U.S. at 606; Jurek v. Texas, 428 U.S. at 271.

In several decisions, the Georgia Supreme Court has considered the statute as applied by the lower Georgia courts and has set guidelines intended to ensure that the jury will consider mitigating circumstances and fashion their sentences accordingly. For instance, in Fleming v. State, 240 Ga. 142, 240 S.E. 2d 37 (1977), the Georgia Supreme Court overturned a death sentence on the grounds that the trial judge failed to inform the jury that "they could recommend a life sentence even if they found the existence of a statutory aggravating circumstance." 240 S.E. 2d at 40. Explaining its decision in terms of an obligation to permit consideration of mitigating circumstances, the Georgia Supreme Court wrote:

> Our system for deciding whether a death sentence is to be given requires the jury to consider two issues in the sentencing phase. First, the jury must consider if the state has proven the existence of at least one statutory aggravating circumstance (Code Ann. §27-2534.1(b)(1-10)), beyond reasonable doubt. Second, if one of these circumstances is found, the jury must then consider the mitigating and aggravating circumstances relevant to the defendant and determine whether the death penalty is appropriate in this case.

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* Section 27-2534.1(b) reads:

> In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence ....

240 S.E. 2d at 40-41. It is thus clearly the opinion of the Georgia Supreme Court that unless the jury is specifically informed that it may impose a sentence for life even if a statutory aggravating circumstance is present, effective consideration of mitigating circumstances will be foreclosed. See also, Hawes v. State, 240 Ga. 327, 240 S.E. 2d 833 (1977). Such an automatic nugatory rendering of mitigating circumstances would of course rise to unconstitutional dimensions.

As noted in the factual summary above, the first Georgia Supreme Court decision involving the Petitioner followed the Fleming and Hawes decisions and set aside the death sentence. In contrast, in the decision from which this petition arises, the Georgia Supreme Court specifically found that the Fleming-Hawes infirmities did not obtain. Spraggins II, 252 S.E.2d at 622. Presumably relying upon parts of the judge's oral charge (Appendix D, hereto), the Georgia Supreme Court obviously believed that the jury was sufficiently informed that a death sentence was not inevitably to derive from a finding of aggravating circumstance. Petitioner submits that in light of the written charge actually carried by the jury into its final deliberations, the Georgia Supreme Court was incorrect in its conclusion that the oral charge was sufficiently salient to instruct the jury on the Fleming-Hawes constitutional issue.

Petitioner appreciates that the jury deliberation process is largely inscrutable. For the most part, the devices which sway juries or the tactics which pass beyond them are matters of mere speculation to observers. Nevertheless, the impact of a written charge carried into

the jury room as a tangible item of authoritative source cannot rationally be minimized. Clearly, such impact is pervasive. To assume that several sentences in an earlier oral charge will cause the jury to deviate from the instructions of the written word is both naive and, more importantly, improper. Petitioner submits that the jury which sentenced him to death was effectively foreclosed from consideration of mitigating circumstances because the judge's written charge failed to inform them that even if they first found an aggravating circumstance, a life sentence could be imposed. Accordingly, petitioner was denied his constitutional right to due process of law.

Moreover, because the written charge overshadowed the oral charge and firmly guided the jury, the statute, in the understanding of the jury, would tend to acquire a mandatory character. For, once the jury found an aggravating circumstance, there was, under the judge's written instructions, no explicit option other than death; and although the language in the written charge is technically permissive, (the charge says "may recommend") the jury members are not trained in law and their interpretation may not be so refined. To the extent that this written charge turned the Georgia statute into a mandatory death statute, petitioner's constitutional rights were violated. See, e.g., Woodson v. North Carolina, 428 U.S. 280 (1976).

B. The Written Charge of the Trial Judge Failed To Instruct the Jury that They Could Consider Mitigating Circumstances.

The judge's written charge, discussed above, also contained the following instruction concerning the scope of the jury's inquiry:

I charge you that you may look to see if there was any one or more of the following aggravating circumstances:

(1) The offense of murder was committed while the offender was engaged in the commission of an additional capital felony, to wit: the rape of Frances Coe.

(2) The offense of Murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture, depravity of mind on the part of the defendant, or an aggravated battery to the victim.

The written charge did not advise the jury that they could consider any mitigating circumstances.

With respect to the absence in the written charge of any reference to mitigating circumstances, the Georgia Supreme Court evidently believed, as suggested above, that the judge's oral charge regarding mitigating circumstances satisfied the constitutional requirements. If the Georgia Supreme Court did not so believe, there is no way to reconcile the decision in petitioner's case with the holding in Hawes v. State. Petitioner accordingly reiterates the points raised above regarding the respective influence on the jury of an oral and a written charge and asks the Court to consider whether or not the sentencing jury was ultimately given sufficient notice and opportunity to consider mitigating circumstances.

In addition, the petitioner submits that the written charge was improper and unconstitutional because by its application, it violated the Georgia statute, found lawful on its face by this Court in Gregg, which calls for an identity of content in the oral and written charges. Ga. Code Ann. §27-2534.1(c). That section requires that the judge in

the sentencing trial provide the jury "in charge and in writing" (emphasis added) with "the statutory instructions as determined by the trial judge to be warranted by the evidence."* The statutory language does not leave room for a significant disparity between the oral and written charges, particularly where the actual written charge omits any mention of mitigating circumstances. Such disparity could only serve to confuse the jury as to which factors it is required to consider and thus confounds the statute's finely tuned guidance that this Court found so salutary in Gregg. Petitioner therefore submits that the exact terms of the statute which support its constitutionality by unqualifiedly guaranteeing consideration of mitigating circumstances, have been nullified in application by the disparity in the judge's oral and written charges.

2. THE GEORGIA STATUTE, AS APPLIED IN THIS CASE, DID NOT INSURE AGAINST A CAPRICIOUS AND ARBITRARY DETERMINATION RESPECTING PETITIONER'S SENTENCE.

A. The Sentencing Jury Considered Irrelevant, Prejudicial and Inflammatory Information Without the Guidance of Clear Judicial Standards.

In Gregg, this Court emphasized that when a human life is at stake there is a critical need to provide a jury with guidance, and to ensure that relevant information is properly considered while irrelevant prejudicial information is excluded:

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* The "statutory instructions" referred to in §27-2534.1 (c) have already been quoted in the petition, at p. ___. They are that "he [the judge] shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances ...."

> Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

Gregg v. Georgia, 428 U.S. at 189. The Court cautioned that "the provision of relevant information under fair procedural rules is not alone sufficient to guarantee that the information will be properly used in the imposition of punishment, especially if sentencing is performed by a jury"; the jury must be given guidance and direction in reaching its determination. Gregg v. Georgia, 428 U.S. at 192.

Petitioner was sentenced to death in proceedings that wholly failed to satisfy the concerns voiced in Furman and Gregg, thereby creating a grave risk that the sentence was imposed in an arbitrary and capricious manner. The jury that sentenced petitioner was permitted to consider inflammatory evidence, and improper, prejudicial statements, without any standards to limit or direct its use of this information. Over the objection of defense counsel, the sentencing court allowed the prosecution to introduce into evidence and to display to the jury several photographs that graphically depicted the wounds suffered by the victim. (Tr.-2 at 133-134, 196-200). There was extensive testimony in the record as to the nature of the crime and the condition of the body (Tr.-2 at 131-132). The pictures were, therefore, not necessary to depict the crime and could serve no legitimate purpose. Rather, they could have served only to evoke feelings of revulsion and contempt in jurors unaccustomed to the spectacle of murder victims. The introduction of this evidence created

a significant danger that the jury would be unduly prejudiced and incapable of reaching a reasoned decision.

Of further prejudicial impact were various comments and statements made by the prosecutor. Mr. Lee examined the petitioner on the issue of prior convictions as follows:

> Q. So you are the kind of guy who goes to trial when you are not guilty but gets found guilty, isn't that right?
>
> A. Yes, but if you can recall in this case right here they never give me no chance to say whether I was or wasn't.
>
> Q. But you were found guilty?
>
> A. They gave me a year.
>
> Q. You didn't serve a year, did you?
>
> A. I would have.
>
> Q. They cut you loose -- how long did you serve?
>
> A. Four months.
>
> Q. Four months isn't a year, is it?
>
> A. Well, that ain't my fault.
>
> Q. They always turn you loose, don't they, when you go in?
>
> A. They never have turned me loose every time I was up there. I done my time.

(Tr. -2 at 242-243). The prosecutor's questions undoubtedly achieved the intended purpose -- to alert the jury to the possibility that unless executed, petitioner would be "cut loose." Not only was the implication unwarranted; Georgia law specifically prohibits the prosecutor from making this argument to the jury. Ga. Code Ann. §27-2206 (1978). In further disregard of this prohibition in his closing argument the prosecutor stated:

> He has been in jail so many times he can't even remember the number of them. Every time he gets out and goes and does something else. You want that to happen here? How would you feel being at your house one night looking out your window and seeing Eddie Spraggins walking up to your front door? If that wouldn't make cold terror run through your heart, I want to know what would. This man needs to be put where he can't do anything to anybody else again and the only way, the only way to be sure of that is recommend the death penalty.

(Tr.-2 at 281-282). At this point defense counsel moved for a mistrial; the trial court denied the motion, instructing the jury not to consider whether the defendant would be considered for parole. Obviously, the effect of this admonition must be assumed to have been negligible.

The impact of the prosecutor's statements, in conjunction with the introduction of the inflammatory pictures, was to arouse the jury's fear and prejudice. This appeal to the juror's sense of terror and outrage prevented a reasoned determination, based on relevant evidence and considerations.

The risk of an arbitrary and capricious decison was, thus, extremely grave; this risk was augumented by the judge's failure to provide the jury with standards to guide its use of the information relevant to the imposition of the sentence. The judge instructed the jury on the use of the evidence as follows:

> In reaching your determination, you are authorized to consider all of the evidence received by you in open court.
>
> You are authorized to consider all the facts and circumstances of the case.

(Tr.-2 at 296). The judge's abandonment of his duty to provide guidance left the jury free to exercise its unbridled discretion in sentencing petitioner to death.

B. Automatic Sentence Review by the Supreme Court of Georgia was Inadequate to Protect Against the Capricious, Arbitrary and Unconstitutional Imposition of Petitioner's Death Sentence.

In upholding Georgia's death penalty statute in Gregg, this Court focused on the automatic appeal to the Georgia Supreme Court as an important additional safeguard against the arbitrary and capricious imposition of the death penalty. 428 U.S. at 198, 204-206. Reliance on the automatic review process is misplaced; the Georgia Supreme Court's review of petitioner's death sentence did not and could not ensure that jury discretion was controlled by clear and objective standards so as to eliminate the risk of arbitrary and capricious action.

Because the statutory aggravating circumstance found by the jury is hopelessly vague, there could be no meaningful review to determine whether the evidence supported the jury's finding, as is required by statute. Ga. Code Ann. §27-2537(c)(2). The court's opinion, predictably, failed to elaborate on its conclusion that the jury's finding was supported by the evidence. Spraggins II, 252 S.E. 2d at 622.

The court is also required under the sentence review statute to consider whether the sentence was imposed under the influence of passion or prejudice. Ga. Code Ann. §27-2537(c)(1). In one conclusory statement, without the basis for its conclusion, the Georgia Supreme Court dismissed this possibility. 252 S.E. 2d at 622.

The court's citation to similar cases in which the death penalty was imposed to support its imposition in this case is of no value in protecting against its random use.

The cases cited by the Court are similar in that they involve murder convictions; presumably in any case in which the defendant is convicted of murder the cases cited would support imposition of a death sentence. See id. at 623.

It is apparent from the summary nature of the Georgia Supreme Court's opinion in this case, that the automatic review afforded a defendant under this statute provides only the illusion of protection against arbitrary and capricious imposition of the death penalty.

3. THE SEVENTH AGGRAVATING CIRCUMSTANCE OF THE GEORGIA STATUTE HAS NOT BEEN GIVEN DEFINITION AND IS THEREFORE UNCONSTITUTIONALLY BROAD AND SUBJECT TO SUBJECTIVE AND CAPRICIOUS APPLICATION.

The jury in the second sentencing trial recommended death upon a finding that an aggravating circumstance attended the murder of which petitioner was convicted. The jury did not find that the rape of the victim, the second possible aggravating circumstance which they were charged to consider, existed. The aggravating circumstance found by the jury was based on the seventh listed in the statutory scheme:

> The offense of Murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture, depravity of mind on the part of the defendant, or an aggravated battery to the victim.

Petitioner submits that as a matter of law, this statutory aggravating circumstance is so broad that it is likely to be applied to almost any murder case, and is therefore unconstitutional.

In Gregg v. Georgia, 428 U.S. at 201, this Court considered the question of whether Georgia's seventh statutory

aggravating circumstance was "so broad that capital punishment could be imposed in any murder case." The Court, obviously expecting future definition of this provision, concluded that:

> It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But the language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction.

Unfortunately, contrary to the Court's expectations, no such definition has been forthcoming from the Georgia Supreme Court. Juries, virtually unguided by the courts of Georgia,* have found that the seventh aggravating cirumstance obtained in cases as diverse as Banks v. State, 237 Ga. 325, 227 S.E. 2d 380, 382 (1976), cert. denied, 430 U.S. 975 (1977), where the firing of two gunshots into a victim was found to constitute torture and depravity of mind, ** and Thomas v. State, 240 Ga. 393, 242 S.E. 2d 1 (1977), where the victim was shot five times in the head, beaten with a shovel and hammer and buried alive. Until the Georgia Supreme Court develops a definition

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* The sentencing trial judge in petitoner's case made no attempt to define the seventh statutory aggravating circumstance in his instructions to the jury. (Appendix D).

** Apparently, where death is not simultaneous with the first intrusion on the victim's body, juries in Georgia are free to conclude that torture was entailed. See also Morgan v. Georgia, 241 Ga. 485, 246 S.E. 2d 198 (1978), where one gunshot fired into the head of the victim was found to constitute the seventh statutory aggravating circumstance.

which can offer guidance,* such breadth of factual circumstances will continue to come within the umbrella of the statute's seventh aggravating circumstance, with the effect that any murder may be found to warrant a death sentence.

Besides its objectionable breadth, Georgia's seventh aggravating circumstance, unrefined as it is, puts a premium on the introduction of inflammatory evidence. Gruesome and detailed testimony accompanied by flagrant exhibits acquires a heightened significance inappropriate to the objective and rational judgment which must inform the decision of whether a human life should be taken or spared. For instance, as discussed above, the admission into evidence of photographs which graphically depicted former testimony had no objective value; its only purpose was to elicit in the jury a visceral feeling of repulsion responsive to such vague standards as "wanton" and "vile."** Because this statutory standard, in its

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* For instance, as noted by this Court, the Florida Supreme Court has articulated a workable definition for a similar capital-sentencing statute in that state: ". . . the phrase 'especially heinous, atrocious or cruel' means a 'conscienceless or pitiless crime which is unnecessarily tortuous to the victim.' State v.Dixon, 283 So.2d 1, 9 (1973)." Gregg v. Georgia, supra at 201; see also, Proffitt v. Florida, 428 U.S. 242, 255-56 (1976).

** Indeed the trial judge admitted as much when he overruled the objections of petitioner's counsel to admission of the photographs. The judge said:

> Further, the state contends that murder was outrageous and wanton and vile, horrible, depravity of mind on the part of the defendant or aggravated battery on the victim, so, I think, it is necessary these pictures be viewed by the jury in order that they can make up their minds as to what sentence this defendant is to receive upon the sentencing phase of the trial.

(Tr.-2 at 135).

current undefined state, invites the death sentence as a function of inflammatory evidence, petitioner submits that it is unconstitutional in that it does not in fact insure against the "wanton" and "freakish" imposition of the death penalty.

4. PETITIONER WAS SENTENCED TO DEATH IN VIOLATION OF THE FIFTH AMENDMENT BAN AGAINST DOUBLE JEOPARDY AND IN VIOLATION OF HIS RIGHT TO DUE PROCESS OF LAW

Under Georgia law the judge at the presentencing hearing is required to instruct the jury to consider any of the statutory aggravating circumstances which may be supported by the evidence. Ga. Code Ann. §27-2534.1(b) and (c). Georgia law also provides "that only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible" at the presentencing hearing. Ga. Code Ann. §27-2503(a) (emphasis added). In petitioner's first sentencing hearing the judge instructed the jury that it could sentence petitioner to death if it found that the murder was committed while the defendant was engaged in the commission of the capital offense of rape. This is the only statutory aggravating circumstance which the judge instructed the jury to consider, see Ga. Code Ann. §27-2534.1(b); the Georgia Supreme Court held that "[t]his was the only aggravating circumstance as to which the defendant had been put on notice." Spraggins I, 243 S.E.2d 20, 23 (1978) (citing Ga. Code Ann. §27-2503).

Following the Georgia Supreme Court's decision setting aside the death sentence and ordering a new sentencing trial the prosecution submitted its sentencing case to the

second jury on the theory that two aggravating circumstances were present in the case--the one that was charged in the first trial and the additional circumstance that the murder was outrageously or wantonly vile, horrible or inhuman. See Ga. Code Ann. §27-2534.1(b)(7). This second jury based its decision to impose the death sentence on its finding beyond a reasonable doubt that "[t]he offense of murder was outrageous, wanton, vile and horrible and inhuman in that it involved torture, depravity of mind on the part of the defendant, and aggravated battery to the victim." (Tr.-2 at 304.) See Ga. Code Ann. §27-2534.1(b)(7) and (c). The second sentencing jury did not find that the murder was committed while the offender was engaged in the commission of rape.

This Court has recognized that "[e]ven if the first trial is not completed, a second prosecution may be grossly unfair" because successive prosecutions increase the emotional burden on the defendant and may significantly enhance the risk of conviction by allowing the prosecution to refine its proof. Arizona v. Washington, 434 U.S. 497, 503-504, and note 14 (1978). "Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." Id. at 505. Although the issue at the second trial was punishment, not guilt, petitioner was, plainly, placed in jeopardy of life. Had the second jury been limited to consideration of the statutory aggravating circumstance charged in the first trial, it could not have sentenced petitioner to death on the basis of its stated findings.

Petitioner submits that it was a violation of the Fifth Amendment's ban against double jeopardy for the prosecution to present its sentencing case to the second jury based on a statutory aggravating circumstance that had not been established by the evidence in the first sentencing trial. If the evidence presented at the first sentencing hearing was inadequate to require the judge to charge the jury on the additional aggravating circumstance, the prosecution should not be entitled to a second chance to prove beyond a reasonable doubt the existence of this aggravating factor. See generally Burks v. United States, 437 U.S. 1 (1977); Price v. Georgia, 398 U.S. 323 (1970); Green v. United States, 355 U.S. 184 (1957).

Petitioner also submits that the proceedings in which he was sentenced to death were fundamentally unfair and denied him due process of law. The prosecution gained an unfair advantage through the opportunity to present its case to a second jury with an additional theory to support imposition of the death sentence. It is impossible to be certain that the second jury's decision to impose death was not the result of its focusing on which of the circumstances was proved by the evidence rather than on whether either was proved beyond a reasonable doubt. See generally Price v. Georgia, 398 U.S. at 331. The prejudice to petitioner is clear since the second jury based its imposition of the death sentence on the broad and undefined circumstance, rather than on the narrowly defined circumstance that served as the basis for the first death sentence.

Finally, the second sentencing trial denied petitioner the procedural protection recognized by Georgia law to be due a defendant in a death penalty case. As the Georgia Supreme Court recognized in petitioner's first appeal, the only aggravating circumstance as to which petitioner had been put on notice, as required by state law, was that charged in the first trial. Spraggins I, 243 S.E.2d at 23; see Ga. Code Ann. §§27-2503, 27-2534.1(b). Since the notice to which petitioner is entitled must precede his trial, no subsequent notice was adequate, under established procedure, to permit the prosecution to expand its case. Ga. Code Ann. §27-2503; Moss v. Georgia, 144 Ga. App. 226, 240 S.E.2d 773 (Ct. App. 1977). The jury's decision to impose the death penalty was, therefore, unlawful.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Georgia Supreme Court.

Respectfully submitted,

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July 6, 1979.

Exhibit A

wife, and in ordering him to pay an indebtedness for a stove purchased for the wife's benefit.

This court will not control the discretion of the trial judge in awarding temporary alimony and attorney fees unless there is a manifest abuse of discretion. *Johnson v. Johnson*, 236 Ga. 647, 225 S.E.2d 36 (1976); *Wilbanks v. Wilbanks*, supra. After reviewing the record of the hearing, we find evidence to support the award of temporary alimony to the wife, and no abuse of discretion.

Judgment affirmed.

All the Justices concur.

SPRAGGINS

v.

The STATE.

No. 34289.

Supreme Court of Georgia.

Argued Jan. 8, 1979.

Decided Feb. 6, 1979.

Following remand for new trial on issue of punishment to be imposed following conviction for rape and murder, 240 Ga. 327, 240 S.E.2d 833, the Meriwether Superior Court, Jackson, J., entered death sentence on jury verdict, and defendant appealed. The Supreme Court, Bowles, J., held that: (1) closing argument by district attorney, that defendant might not be required to suffer full penalty imposed by court or jury because pardon, parole or clemency might be granted, was within permissible range afforded to prosecuting attorney who is seeking death penalty; (2) written list of aggravating circumstances was properly given to jury to be carried with them into jury room; (3) verdict was not improperly prepared in open court under instructions of district attorney; (4) record demonstrated that sentence of death was not imposed under influence of passion, prejudice or any other arbitrary factor; (5) evidence supported jury's finding of aggravated circumstance, and (6) sentence of death was not excessive or disproportionate considering both crime and defendant.

Affirmed.

1. Criminal Law ⇐723(1)

Closing argument by district attorney in murder-rape prosecution, that defendant might not be required to suffer full penalty imposed by court or jury because pardon, parole or clemency might be granted, was within permissible range afforded to prosecuting attorney who is seeking death penalty. Code, § 27-2206.

2. Criminal Law ⇐730(14)

Even if closing argument by district attorney in murder-rape prosecution, that defendant might not be required to suffer full penalty imposed by court or jury because pardon, parole or clemency might be granted, was improper, such impropriety was cured by trial judge's corrective instruction. Code, § 27-2206.

3. Criminal Law ⇐858(1)

In murder-rape prosecution, written list of aggravating circumstances was properly given to jury to be carried with them into jury room. Code, § 27-2534.1(c).

4. Criminal Law ⇐857(1)

Verdict in murder-rape prosecution was not improperly prepared in open court under instructions of district attorney, where foreman stated that the verdict had been reached in jury room, where, because verdict form had not been completed in accordance with court's instructions, district attorney handed verdict form back to foreman and instructed her to strike out the inapplicable verdict, where the court reiterated such instruction to the foreman, and where the jurors were polled and each answered that verdict was his own, freely and voluntarily given.

5. Criminal Law ⇐768(1)

Jury instruction in murder-rape prosecution, that "It is not wise to immediately express a determination or insist upon a certain verdict," did not encroach upon the jury's deliberation function.

6. Homicide ⇐354

Record in murder-rape prosecution demonstrated that sentence of death imposed upon defendant was not imposed under influence of passion, prejudice or any other arbitrary factor. Code, § 27-2537(c)(1).

7. Homicide ⇐354

Evidence in murder-rape prosecution in which death penalty was imposed supported jury's finding of an aggravating circumstance, viz., that the murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture and depravity of mind on part of defendant or aggravated battery to the victim.

8. Criminal Law ⇐193

No double jeopardy violations occurred, in resentencing trial on convictions of rape and murder, by submission to jury of list of aggravating circumstances to be considered.

9. Criminal Law ⇐1206(2)

Sentence of death imposed in murder-rape prosecution was not excessive or disproportionate considering both crime and defendant. Code, § 27-2537(c)(3).

A. Vernon Belcher, Greenville, for appellant.

Arthur K. Bolton, Atty. Gen., John W. Dunsmore, Jr., Asst. Atty. Gen., William F. Lee, Jr., Dist. Atty., for appellee.

BOWLES, Justice.

The appellant, Eddie Spraggins, was indicted by a grand jury in Meriwether County for the January 31, 1977, rape and murder of Frances Coe. He was tried by a jury and found guilty of both offenses.

In *Spraggins v. State*, 240 Ga. 759, 243 S.E.2d 20 (1978), appellant's conviction and life sentence for rape were affirmed. However, because the court in its sentencing instructions failed to make clear to the jury that they could recommend a life sentence even if they found the existence of a statutory aggravating circumstance (*Fleming v. State*, 240 Ga. 142, 240 S.E.2d 37 (1977)); and failed to inform the jury that they were authorized to consider mitigating circumstances, as required by Code Ann. §§ 27-2534.1(b) and 27-2534.1(c), (*Hawes v. State*, 240 Ga. 327(9), 240 S.E.2d 833 (1977)), appellant's sentence of death for murder was reversed and a new trial ordered on the issue of punishment.

Upon resentencing, the jury found that the murder was "outrageously and wantonly vile, horrible, and inhuman in that it involved torture and depravity of mind on the part of the defendant, or an aggravated battery to the victim." Code Ann. § 27-2534.1(b)(7). A verdict was returned for the death penalty and appellant was sentenced to death.

The case is here on direct appeal and for mandatory review of the death sentence imposed. Code Ann. § 27-2537. The facts surrounding the murder and rape of Frances Coe are set out in *Spraggins v. State*, supra, and its companion case, *Davis v. State*, 240 Ga. 763, 243 S.E.2d 12 (1978).

1. In his first enumeration of error, appellant complains that the trial court erred in denying his motion for mistrial, made after the district attorney's request for the death penalty in closing argument. Appellant argues that the district attorney's statement violated Code Ann. § 27-2206, which forbids a prosecutor from arguing that a defendant may not be required to suffer the full penalty imposed by the court or jury, because pardon, parole or clemency of any nature may be granted. Although the trial judge overruled appellant's motion for mistrial, he did instruct the jury not to consider whether, if given a life sentence, appellant might be paroled.

[1] We have reviewed the closing argument made by the district attorney and find it to be within the permissible range afforded to a prosecuting attorney who is seeking

the death penalty. *Redd v. State*, 242 Ga. ——, 252 S.E.2d 383 (1979); *Mason v. State*, 236 Ga. 46, 222 S.E.2d 339 (1976); *Tamplin v. State*, 235 Ga. 20(4), 218 S.E.2d 779 (1975).

[2] Even assuming arguendo that the argument was improper, it was cured by the judge's corrective instruction. *Pryor v. State*, 238 Ga. 698(7), 234 S.E.2d 918 (1977). The trial judge did not err in refusing to grant appellant's motion for mistrial.

[3] 2. Appellant complains that it was error to give to the jury a list of aggravating circumstances put forth by the State to be carried with them into the jury room.

Code Ann. § 27-2534.1(c) requires that the trial judge give the statutory instructions warranted by the evidence to the jury in its charge and in writing. There was evidence to support the aggravating circumstances given to the jury in the charge and in writing. *Harris v. State*, 237 Ga. 718, 230 S.E.2d 1 (1976); *Douthit v. State*, 239 Ga. 81(6), 235 S.E.2d 493 (1977). As the law requires that the written list of aggravating circumstances as charged by the court be given to the jury for use in its deliberations, there is no merit to appellant's second argument. The form given to the jury in this case complied with the law and conformed to the evidence.

[4] 3. Appellant complains that the jury prepared its verdict in open court under the instructions of the district attorney.

A review of the transcript shows that the jury reached its verdict in the jury room. The foreman announced, in open court, that a verdict had been reached. Because the verdict form, when handed to the district attorney, had not been completed in accordance with the court's earlier instruction, the district attorney handed the form back to the foreman, and instructed her to strike out one of the two verdicts which did not apply. The court reiterated this instruction to the foreman. No objection was made by appellant.

We find no error. The foreman stated that the verdict had been reached in the jury room. The jurors were polled, and each answered that the verdict was his own, freely and voluntarily given. No harm is shown to have resulted from the instruction given.

Appellant's third enumeration of error is without merit.

[5] 4. Appellant complains that the trial court infringed on the jury's exclusive authority by instructing that, "It is not wise to immediately express a determination or insist upon a certain verdict." We do not agree with appellant's contention.

The court's instruction did not encroach on the jury's deliberation function. Appellant's fourth enumeration of error has no merit.

[6] 5. Sentence Review. Our sentence review has included consideration of the aggravating circumstances found by the jury and the evidence introduced in court concerning the crime and the defendant. After a thorough review of the record and transcript, we conclude that the sentence of death imposed on Eddie Spraggins was not imposed under the influence of passion, prejudice or any other arbitrary factor. Code Ann. § 27-2537(c)(1).

[7, 8] The evidence supports the jury's finding of an aggravating circumstance, namely that the offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture and depravity of mind on the part of the defendant or an aggravated battery to the victim. No double jeopardy violations occurred in the court's submission to the jury of the list of aggravating circumstances to be considered on resentencing. *Redd v. State*, supra.

We have reviewed the instructions given by the trial judge on resentencing and find that they are not subject to the defects dealt with in our decisions in *Fleming v. State*, supra, and *Hawes v. State*, supra.

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed for murder, and we find the cases listed in the

appendix support affirmance of the death penalty.

[9] Eddie Spraggins' sentence to death for murder is not excessive or disproportionate considering both the crime and the defendant. Code Ann. § 27-2537(c)(3). The verdict is factually supported.

Judgment affirmed.

All the Justices concur.

APPENDIX

House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974); *Gregg v. State*, 233 Ga. 117, 210 S.E.2d 659 (1974); *Floyd v. State*, 233 Ga. 280, 210 S.E.2d 810 (1974); *Chenault v. State*, 234 Ga. 216, 215 S.E.2d 223 (1975); *Smith v. State*, 236 Ga. 12, 222 S.E.2d 308 (1976); *Birt v. State*, 236 Ga. 815, 225 S.E.2d 248 (1976); *Coleman v. State*, 237 Ga. 84, 226 S.E.2d 911 (1976); *Isaacs v. State*, 237 Ga. 105, 226 S.E.2d 922 (1976); *Dungee v. State*, 237 Ga. 218, 227 S.E.2d 746 (1976); *Banks v. State*, 237 Ga. 325, 227 S.E.2d 380 (1976); *Young v. State*, 239 Ga. 53, 236 S.E.2d 1 (1977); *Gaddis v. State*, 239 Ga. 238, 236 S.E.2d 594 (1977); *Peek v. State*, 239 Ga. 422, 238 S.E.2d 12 (1977); *Bowden v. State*, 239 Ga. 821, 238 S.E.2d 905 (1977); *Westbrook v. State*, 242 Ga. 151, 249 S.E.2d 524 (1978); *Finney v. State*, 242 Ga. 582, 250 S.E.2d 388 (1978); *Davis v. State*, 242 Ga. 901, 252 S.E.2d 443 (1979).

KEY NUMBER SYSTEM

WANSOR
v.
GEORGE HANTSCHO COMPANY, INC. et al.

No. 34453.

Supreme Court of Georgia.

Argued Jan. 16, 1979.

Decided Feb. 6, 1979.

In case involving question certified from United States Court of Appeals, Fifth Circuit, the Supreme Court, Undercofler, P. J., held that where product was manufactured in 1960–61, product was purchased and installed in 1961, Georgia Legislature amended statute in 1968 to overcome privity limitations on tort recoveries, product caused injury to individual in 1971 due to product's alleged defective condition, doctrine of strict liability in tort did not apply to product, since to apply 1968 statute, which created a new cause of action in Georgia applicable to manufacturer of any personal property sold as new property, to product sold in 1961 would violate applicable statute forbidding retrospective application of laws.

Certified question answered in negative.

Products Liability ⇐2

Where product was manufactured in 1960–61, product was purchased and installed in 1961, Georgia Legislature amended statute in 1968 to overcome privity limitations on tort recoveries, product caused injury to individual in 1971 due to product's alleged defective condition, doctrine of strict liability in tort did not apply to product, since to apply 1968 statute, which created a new cause of action in Georgia applicable to manufacturer of any personal property sold as new property, to product sold in 1961 would violate applicable statute forbidding retrospective application of laws. Code, §§ 102–104, 105–106.

Johnson, Ward, Stanfield, Lanham & Carr, Cullen M. Ward, Clark H. McGehee, Atlanta, for appellant.

N. Forrest Montet, David M. Leonard, Hurt, Richardson, Garner, Todd & Cadenhead, T. Cullen Gilliland, Atlanta, for appellees.

UNDERCOFLER, Presiding Justice.

The following question has been certified to this court from the United States Court

Appendix B

The following are those provions of the Georgia Code Annotated that are involved in this case:

27-2206 Counsel prohibited from arguing possibility of executive clemency; mistrial for violation of rule

No attorney at law in a criminal case shall argue to or in the presence of the jury that a defendant, if convicted, may not be required to suffer the full penalty imposed by the court or jury, because pardon, parole, or clemency of any nature may be granted by the Governor, State Board of Pardons and Paroles, or other proper authority vested with the right to grant clemency. If counsel for either side in a criminal case should so argue to the jury, opposing counsel shall have the right to immediately request the court to declare a mistrial; and in which case, it shall be mandatory upon the court to declare a mistrial; and upon failure so to do, same shall constitute reversible error.

This section shall be construed as setting forth regulations in addition to those provided for in section 24-3319 and section 81-1009.

(Acts 1955, pp. 191, 192.)

27-2503 Presentence hearings in felony cases

(a) Except in cases in which the death penalty may be imposed, upon the return of a verdict of "guilty" by the jury in any felony case, the judge shall dismiss the jury and shall conduct a presentence hearing at which the only issue shall be the determination of punishment to be imposed.

In such hearing the judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas: Provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument. In cases in which the death penalty may be imposed, the judge when sitting without a jury shall follow the additional procedure provided in section 27-2534.1. Upon the conclusion of the evidence and arguments the judge shall impose the sentence or shall recess the trial for the purpose of taking the sentence to be imposed under advisement. The judge shall fix a sentence within the limits prescribed by law. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

(b) In all cases in which the death penalty may be imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the court shall resume the trial and conduct a presentence hearing before the jury. Such hearing shall be conducted in the same manner as presentence hearings conducted before the judge as provided in subsection (a) of this section. Upon the conclusion of the

evidence and arguments, the judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in section 27-2534.1, exist and whether to recommend mercy for the defendant. Upon the findings of the jury, the judge shall fix a sentence within the limits prescribed by law.

(Acts 1974, pp. 352, 257.)

27-2534.1 Mitigating and aggravating circumstances; death penalty

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated

battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1(b) is so found, the death penalty shall not be imposed.

(Acts 1973, pp. 159, 163.)

27-2537 Review of death sentences

(a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within 10 days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be

in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27-2534.1(b), and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred

to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

(Acts 1973, pp. 159, 165.)

[12] 7. The jury sentenced Redd to death after finding him guilty of murder in the course of kidnapping with bodily harm to the victim, which is an aggravating circumstance authorizing the ultimate penalty under Code Ann. § 27-2534.1(b)(2). In Enumeration 10 Redd argues correctly that his death sentence must be set aside for failure of the trial court to make clear to the jury in his charge taken as a whole that they might in their discretion recommend a life sentence even if they found the existence of a statutory aggravating circumstance. *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833 (1977); *Fleming v. State*, 240 Ga. 142, 240 S.E.2d 37 (1977). The lack of clarity in the charge was raised below by specific objection by Redd's attorney, but no recharge was made. Accordingly, the death sentence must be overturned and Redd must be resentenced, which also has the effect of mooting Enumerations 9, 11 and 12 which attack other aspects of the sentencing procedure.

Redd's conviction and life sentence for kidnapping are affirmed. His murder conviction is affirmed, but the sentence is set aside and a new trial is ordered on the issue of punishment for that offense.

Judgment affirmed in part and reversed in part.

All the Justices concur, except JORDAN, J., who dissents.

JORDAN, Justice, dissenting.

I dissent to Division 7 of the opinion in which the death sentence is set aside and a new trial ordered as to punishment. In my opinion the charge taken as a whole meets the requirement of the law.

On the punishment phase of the trial, the court charged the jury to "consider all of the evidence received by you in open court, in both phases of the trial. You are authorized to consider all the facts and circumstances of the case." The charge made it clear that the crimes for which the defendant had been found guilty were punishable by death or life, and that it was their duty to determine the penalty within the established limits. The court further correctly charged that "before you would be authorized to find a verdict fixing a sentence of death . . . , you must find evidence of statutory aggravating circumstances . ."

In my opinion this charge made it quite clear that the jury could consider all of the facts and circumstances of the case, including evidence in mitigation and aggravation, in order to arrive at the proper penalty and that they were authorized to fix the punishment at *either* death or life. The charge on aggravating circumstances did not mandate a sentence of death if such was found, but merely *authorized* the death penalty.

I think the jury fully understood its duties and prerogatives under the charge as given. I would affirm.

240 Ga. 759

Eddie SPRAGGINS

v.

The STATE.

No. 32605.

Supreme Court of Georgia.

Feb. 21, 1978.

Defendant was convicted before the Superior Court, Meriwether County, Joseph C. Jackson, J., of rape and murder, and he appealed. The Supreme Court, Hill, J., held that: (1) evidence was sufficient to sustain convictions; (2) GBI agent's voluntary testimony that defendant was known to have been drinking on night before offenses and that agent had learned that defendant "was the type [of] person * * * who got into fights. They had a bit of trouble with him periodically" was not so prejudicial that it could not be cured by certain instructions, but (3) failure to instruct that jury could

recommend life sentence even if they found existence of a statutory aggravating circumstance and that they were authorized to consider mitigating circumstances was error requiring that death penalty be set aside and that there be a new sentencing trial.

Judgment affirmed as to the convictions; reversed as to the death sentence for murder.

Jordan, J., dissented to the reversal of death sentence for reasons set forth in another case.

1. Homicide ⇐250
Rape ⇐51(1)

Evidence, including defendant's statement to effect that he had killed victim and circumstantial evidence of carnal knowledge of victim, was sufficient to sustain defendant's conviction of rape and murder. Code, § 26–2001.

2. Criminal Law ⇐1169.5(4)

In proceeding in which defendant was convicted of rape and murder, GBI agent's voluntary testimony that defendant was known to have been drinking on night before offenses and that agent had learned that defendant "was the type [of] person * * * who got into fights. They had a bit of trouble with him periodically" was not so prejudicial that it could not be cured by instructions that jury was to disregard anything said about defendant in regard to drinking or trouble he might have had with police and that State had burden of proving that defendant committed crime for which he was charged. Code, § 38–202.

3. Homicide ⇐311, 341

In proceeding in which defendant was convicted of rape and murder and was sentenced to death, failure to instruct that jury could recommend life sentence even if they found existence of a statutory aggravating circumstance and that they were authorized to consider mitigating circumstances was error requiring that death penalty be set aside and that there be a new sentencing trial. Code, §§ 27–2503, 27–2534.1(b), (b)(2, 4, 7), (c), 27–2537(c)(1).

A. Vernon Belcher, Greenville, for appellant.

William F. Lee, Jr., Dist. Atty., Greenville, Arthur K. Bolton, Atty. Gen., John W. Dunsmore, Jr., Asst. Atty. Gen., Atlanta, for appellee.

HILL, Justice.

This is a death case. The defendant Eddie Spraggins, along with Freddie Davis,[1] was indicted in Meriwether County for the January 31, 1977, rape and murder of Miss Frances Coe. After a special jury found the defendant sane at time of trial, he was tried and found guilty on March 1 and 2, 1977, on both counts. Upon the jury's finding of a statutory aggravating circumstance to the murder charge, that the murder was committed while the offender was engaged in the rape, the defendant was sentenced to death for murder and life imprisonment for rape.

Evidence was presented from which the trial jury was authorized to find the following: On the afternoon of January 31, 1977, the semi-nude body of Frances Coe, age about 55, was found in her home in Manchester, Georgia. She had been repeatedly stabbed, slashed and cut, including having her throat cut. There were several wounds to the body which caused the victim to bleed heavily, with the most severe stab wounds being in the upper abdomen and lower chest, including two in the upper abdomen which penetrated the heart. She had been partially disembowelled. Death was attributed to a loss of blood.

The victim was found lying partially on her bed. Her sweater was open, her slip had been pulled up and her pantyhose and panties had been pulled down. There was testimony that there had been manipulation of the victim's sexual organs. There were bruises on her thigh and in the vicinity of the vaginal opening. There was hemorrhaging around the urethra and a small tear in the vaginal orifice. Doctor Byron

1. See *Davis v. State*, 240 Ga. 763, 243 S.E.2d 12 (1978).

Dawson who performed the autopsy testified that although no sperm cells were found, in his opinion the injuries he described were consistent with those associated with sexual relations.

The defendant and the victim were neighbors. The night of the murder the defendant was seen burning something in his back yard. A zipper and cloth material and a flashlight of the type owned by the victim were recovered from the ashes.

When told that there was a warrant out for his arrest, the defendant stated that there was nothing to it, that he had hit somebody but that he did not get any money out of her.

In a pre-trial statement to a GBI agent (following appropriate advice concerning his rights) the 34-year-old defendant was quoted as follows: "On Sunday night, the 30th of January, 1977, Freddie Davis and I went to Frances Coe's house. We had been talking about robbing Frances Coe for a long time. We stopped at the back of the house, and I told Freddie to stay at the back and I went to the front, knocked on the door and Frances Coe let me in. I told her I wanted to use the telephone. I told her to open the back door and let Freddie in. I hit her and she started screaming. I got her around the neck and held her while I opened the back door. Freddie came in. I pulled her back into the bedroom. I had my hand over her mouth to keep her from hollering. Freddie said, 'Shut her up,' and handed me his knife, and I opened the knife and stabbed her and cut her throat. She just would not die and I just kept cutting. Freddie said, 'You got to finish her off.' I wiped the blood off my hands on a towel. I gave the knife back to Freddie. Freddie got her flashlight looking for money. After we left, he gave me the light. I burned it and a blue windbreaker behind my house."

The defendant presented two witnesses in addition to his own testimony. One witness testified that the defendant had worked for her husband but that he could only perform small uncomplicated menial tasks helping her husband do odd jobs around the house. She said that he could not count change for a dollar, and that she did not think he could read or write. The defendant's sister testified that he could never learn in school and always had mental problems and they sought help for him in a number of different places.

The defendant testified that he did not remember going to Frances Coe's house; that he drank heavily; that he did not rape her, nor had he ever raped anyone; that he could not read; and that he had never told law enforcement officers that he had participated in her killing.

On cross examination the defendant admitted he had burned several coats and "I might have did burn the flashlight too." He admitted that when he was arrested he was in the trunk of Buddy Mullis' automobile, and stated that he was not exactly hiding and that he found it comfortable in the trunk because it was a good place where he could lie down and rest when he wanted to be by himself.

On appeal the defendant enumerates two errors.

[1] 1. In the defendant's first enumeration he asserts that the trial court erred in denying his motion for new trial based on the general grounds. The evidence as to murder is more than adequate. In view of the death of the victim there is, however, no direct evidence as to the rape. Specifically, the evidence as to the second element of carnal knowledge, Code § 26-2001, is circumstantial at most. Considering all the facts and circumstances, however, we find that there was sufficient evidence regarding rape to support the jury's verdict. *Harris v. State*, 236 Ga. 242(1), 223 S.E.2d 643 (1976). It was not error to overrule the motion for new trial based on the general grounds.

[2] 2. In Enumeration 2 defendant asserts that the trial court erred in denying his motion for mistrial when a GBI agent voluntarily testified as to the defendant's character.

While the officer was testifying for the state the district attorney asked him: "Q.

Now, based on the evidence that you gathered in your investigation, you confronted the defendant Eddie Spraggins, is that correct?" The officer deviated, saying: "A. Not at this time. We continued to gather other things. Eddie Spraggins was known to have been drinking the night before and in this area. I did a little background work on Eddie Spraggins from the police department and learned that he was the type person, you know, who got into fights. They had a bit of trouble with him periodically. In addition to this, just prior to—" The district attorney interrupted asking: "Q. But, you did eventually go to him, is that correct?" The officer answered: "A. Oh, yes sir. I did eventually go to him. I was just telling you the background, what led me to him." The district attorney next asked the officer if he had had a conversation with the defendant.

Thereafter the jury was excused and a *Jackson-Denno* hearing was held. At its conclusion, defendant's counsel moved for a mistrial because the officer had injected the defendant's bad character into evidence. The court overruled the motion for mistrial but on return of the jury the trial court instructed the jury as follows: "The court instructs you to disregard anything that might have been said pertaining to this defendant in regard to any drinking or any fighting or any conflicts, any trouble he might have been in with the Manchester Police Department, because that has no bearing on this case whatsoever. The purpose of this case is to determine whether or not this defendant did commit the crime for which he is charged. The state has the burden of proving that and not anything other than that shall be considered in the trial of this case."

We do not find that the officer's improper comments in the presence of the jury were so prejudicial that the curative instructions by the court were ineffective. The trial court did not abuse its discretion in refusing to grant the motion for mistrial. *Googe v. State*, 237 Ga. 175(1), 227 S.E.2d 51 (1976); *Lynch v. State*, 234 Ga. 446, 448, 216 S.E.2d 307 (1975); *Woods v. State*, 233 Ga. 495, 497–498, 212 S.E.2d 322 (1975); *Wingfield v. State*, 231 Ga. 92(8), 200 S.E.2d 708 (1973); Code Ann. § 38–202.

3. *Sentence review.*

[3] After finding the defendant guilty of murder and rape at the guilt-innocence phase of the trial, at the sentencing phase the jury found that the offense of murder was committed while the offender was engaged in the commission of another capital felony, the rape, and imposed the death penalty. This was the only aggravating circumstance as to which the defendant had been put on notice. Code Ann. § 27–2503. Cf. Code Ann. § 27–2534.1(b)(2), (4) and (7).

We first consider whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. Code Ann. § 27–2537(c)(1).

The court's sentencing instructions failed to make clear to the jury that they could recommend a life sentence even if they found the existence of a statutory aggravating circumstance (*Fleming v. State*, 240 Ga. 142(7), 240 S.E.2d 37 (1977), and failed to inform the jury that they were authorized to consider mitigating circumstances in contravention of requirements laid down in Code Ann. §§ 27–2534.1(b) and 27–2534.1(c), *Hawes v. State*, 240 Ga. 327(9), 240 S.E.2d 833 (1977)). The jury instructions in the case before us failed to comply with the requirements of *Fleming* and *Hawes* and thus the death penalty must be set aside and a new sentencing trial allowed.

Judgment affirmed as to the convictions; reversed as to the death sentence for murder.

All the Justices concur, except JORDAN, J., who dissents from the reversal of the death sentence.

JORDAN, Justice, dissenting.

I dissent to the reversal of the death penalty for the reasons set forth in my dissent in *Redd v. State*, 240 Ga. 753, 243 S.E.2d 16 (1978).

Exhibit D

Now, His Honor will charge you that the defendant comes into this court with the presumption of innocence in his favor and the burden rests upon the State to satisfy your minds to the reasonable doubt that this defendant is guilty and that he should be executed.

Now, with these brief remarks I am going to leave it with you and ask you to bring back a verdict here recommending mercy. Then the Judge will sentence him to life in prison and he will never get out. He is not even eligible until he has been in there for 25 years. And with these remarks, I thank you.

THE COURT: Ladies and gentlemen of the jury, this defendant has been found guilty of the offense of murder. It is now your duty to determine within the limits prescribed by law the penalty that shall be imposed for that offense.

Under the laws of this state, every person guilty of the offense of murder shall be punished by life imprisonment or death by electrocution. In all cases for which the death penalty may be authorized, the law provides that the judge

shall instruct the jury concerning any evidence in extenuation, mitigation and aggravation, which the jury may consider in making their decision as to what punishment is to be imposed upon the defendant.

In reaching your determination, you are authorized to consider all of the evidence received by you in open court.

You are authorized to consider all of the facts and circumstances of the case.

Ladies and gentlemen of the jury, in reaching your verdict you are authorized to consider all of the facts and circumstances, if you find there be any, in mitigation of punishment. In determining whether mitigating circumstances exist, you are authorized to consider all of the evidence produced by the State and the defendant throughout this trial.

Mitigating circumstances are those circumstances which do not constitute a justification or excuse for the crime, but which may be considered as extenuating or reducing the moral culpability or blame.

In reaching this verdict, you are not required to find mitigating circumstances

in order to recommend the sentence of life in prison. You may recommend a sentence of life imprisonment regardless of whether or not you believe mitigating circumstances exist in this case.

Ladies and gentlemen of the jury, I charge you that before you would be authorized to find a verdict fixing a sentence of death by electrocution, you must find evidence of statutory aggravating circumstances as I will define to you later in this charge, sufficient to authorize the supreme penalty of the law.

Aggravating circumstances are those which increase the guilt or enormity of the offense or as to its injurious consequences.

The law provides that when a party is tried by a jury, and is convicted of an offense that may be punished by death, the sentence of death shall not be imposed, unless the jury's verdict includes a finding of at least one aggravating statutory circumstance and a recommendation that the death sentence be imposed. When a statutory aggravating circumstance is found, and a recommendation of death is made, the Court shall sentence the defendant

to death.

When a sentence of death is not recommended by the jury, the Court shall sentence the defendant to prison for and during his natural life.

Therefore, before you would be authorized to recommend a sentence of death, in this case, you must find that the State has proved at least one of the following statutory aggravating circumstances to exist beyond a reasonable doubt:

One, the offense of murder was committed while the offendor was engaged in the commission of additional capital felonies, to wit, the rape of Frances Coe.

Two, the offense of murder was outrageously and wantonly vile, horrible and inhuman and in that it involved torture, depravity of mind on the part of the defendant, or an aggravated battery to the victim.

Now, ladies and gentlemen of the jury, a list of these aggravating circumstances that the State contends exist in this case are listed on a piece of paper and will be out with you in the jury room during your deliberations.

Ladies and gentlemen of the jury, if you do not find that the State has proved at least one of these statutory aggravating circumstances beyond a reasonable doubt, then you must recommend a sentence of life imprisonment.

If you should find that the State has proved at least one of the statutory aggravating circumstances beyond a reasonable doubt, then you still may, if you so choose, recommend a sentence of life imprisonment.

If you find the State has proved at least one of the statutory aggravating circumstances beyond a reasonable doubt, then you may recommend that the death penalty be imposed, but you are not required to do so.

Now, ladies and gentlemen of the jury, a reasonable doubt is a doubt for which you can give a reason, and means just what it says. It is the doubt of a fair-minded impartial juror honestly seeking the truth -- not an arbitrary or capricious doubt, but a doubt arising from a consideration of the evidence, or from a lack of evidence, or from a conflict of evidence.

Ladies and gentlemen of the jury, upon

retiring to the jury room, you will select one of you to act as foreman or forelady, who will preside over your deliberations, and who will sign the verdict to which all 12 of you freely and voluntarily agree. Your initial conduct upon entering the jury room is a matter of importance. It is not wise to immediately express a determination or insist upon a certain verdict. If your sense of pride is aroused, you may hesitate to change your position if you decide if you are wrong. Consult with one another and consider each other's views. Each of you must decide this case for yourselves, but you should do so only after a discussion and consideration of the case with your fellow jurors. Do not hesitate to change an opinion if you are convinced that it is wrong. However, you should never surrender honest convictions or opinions in order to be congenial, or to reach a verdict solely because of the opinions of other jurors.

Now, I charge you that the verdict you return in this case must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree

thereto. The verdict must be unanimous.

Now, ladies and gentlemen of the jury, after a careful consideration of all of the evidence, facts and circumstances of this case, under the rules of law that I have given you in charge, if your verdict should be death, then the form of your verdict would be:

"We, the jury, recommend death. We find the following aggravating circumstances:"

Listing the circumstances that you find.

On the otherhand, if you do not find that there was one or more aggravating circumstances, or it is your verdict that you do not recommend death in this case, then the form of your verdict would be:

"We, the jury, affix punishment at life."

Whatever your verdict may be, it can be written by filling in the blanks and marking out that which does not apply so as to make this form, which I have prepared for you, speak the true verdict of the jury. Please remember to mark out the part of the form that does not apply and fill in the blanks that do apply. Your verdict should be dated, and should be signed by your foreman.

Ladies and gentlemen of the jury, you may retire to fix the punishment in this case. You may begin deliberating as soon as you receive the indictment and all the evidence that was introduced in this case. However, ladies and gentlemen of the jury, before you retire, I hereby instruct the two alternate jurors to keep their seats until the other 12 jurors have gone to the jury room. Let this jury go to the jury room.

(Thereupon, the jury exited the hearing room.)

THE COURT: You all gather up the evidence.

Now, in regard to you two alternate jurors, you will not sit in on the deliberations of the jury in this matter unless you are needed later on. Another room has been made available to you where you will remain under guard by a court bailiff so you will be available if you are needed.

Let these two alternate jurors go to one of the witness rooms with a bailiff on guard.

(Thereupon, the two alternate jurors exited the hearing room.)

THE COURT: All right, you other bailiffs

gather up all this evidence including the indictment, the form of the verdict, and take it into the jury room for their consideration.

(Thereupon, a recess was taken while the jury deliberated the case.)

THE COURT: Let the record reflect that the jury has announced it has reached a verdict. The defendant is in the courtroom. The defendant's lawyer is in the courtroom.

Let the jury come in.

(Thereupon, the jury entered the hearing room.)

THE COURT: Let's everybody be seated and quiet.

Ladies and gentlemen of the jury, have you reached a verdict?

THE FOREMAN: Yes, we have.

THE COURT: The Court would like to announce that regardless of what the verdict is, there will be no outbursts. Everybody will remain seated until we have recessed court and the jury is escorted from the courtroom.

All right, receive the verdict, Mr. Lee.

MR. LEE: Madame Foreman, you must strike out one of the two verdicts. Don't strike out what does not apply. If you recommend life,

THE STATE : CASE NO. 1188

VS : MERIWETHER COUNTY

EDDIE SPRAGGINS : SUPERIOR COURT

CRIM. MIN. BOOK 10 PAGE 526

PUNISHMENT CHARGE

LADIES AND GENTLEMEN OF THE JURY, THE DEFENDANT IN THIS CASE HAS BEEN FOUND GUILTY OF THE OFFENSE OF MURDER, AND IT IS YOUR DUTY TO DETERMINE, WITHIN THE LIMITS PRESCRIBED BY LAW, THE PENALTY WHICH SHALL BE IMPOSED AS PUNISHMENT FOR THAT OFFENSE.

UNDER THE LAWS OF THIS STATE, PUNISHMENT FOR THIS OFFENSE IS DEATH BY ELECTROCUTION, OR BY LIFE IN PRISON. I CHARGE YOU THAT TO RETURN A VERDICT RECOMMENDING DEATH, THERE MUST BE SOME AGGRAVATING CIRCUMSTANCE, OR CIRCUMSTANCES FOUND BEYOND A REASONABLE DOUBT.

I CHARGE YOU THAT YOU MAY LOOK TO SEE IF THERE WAS ANY ONE OR MORE OF THE FOLLOWING AGGRAVATING CIRCUMSTANCES:

(1) The offense of murder was committed while the offender was engaged in the commission of an additional capital felony, to-wit: the Rape of Frances Coe.

CRIM. MIN. BOOK 10 PAGE 527

(2) The offense of Murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture, depravity of mind on the part of the defendant, or an aggravated battery to the victim.

IF YOU FIND THERE WAS ONE OR MORE OF THESE AGGRAVATING CIRCUMSTANCES, ESTABLISHED BEYOND A REASONABLE DOUBT, YOU MAY FIX PUNISHMENT AT DEATH.

IN THIS EVENT, THE FORM OF YOUR VERDICT WOULD BE:

"WE, THE JURY, RECOMMEND DEATH". "WE FIND THE FOLLOWING AGGRAVATING CIRCUMSTANCES; (1) The offense of murder was committed while the offender was engaged in the commission of an additional capital felony, to-wit: the Rape of Frances Coe.

CRIM. MIN. BOOK 10 PAGE 528

(2) The offense of Murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture, depravity of mind on the part of the defendant, or an aggravated battery to the victim.

IF YOU DO NOT FIND THAT THERE WAS ONE OR MORE AGGRAVATING CIRCUMSTANCES, THEN THE FORM OF YOUR VERDICT WOULD BE, "WE, THE JURY, FIX PUNISHMENT AT LIFE".

WHATEVER YOUR VERDICT MAY BE, IT CAN BE WRITTEN BY FILLING IN THE BLANKS, AND MARKING OUT THAT WHICH DOES NOT APPLY SO AS TO MAKE THIS FORM WHICH I HAVE PREPARED FOR YOU SPEAK THE TRUE VERDICT OF THE JURY.

THE VERDICT SHOULD BE DATED AND SIGNED BY ONE OF YOUR MEMBERS AS FOREMAN.

Supreme Court, U. S.
FILED
AUG 8 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

79-5032

NO. [redacted]

EDDIE SPRAGGINS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-5032

EDDIE SPRAGGINS,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1.

Did the trial court's instructions during sentencing fail to convey to the jurors all of the various mitigating factors, as well as to inform them that they could impose a life sentence even if they found beyond a reasonable doubt one of the statutory aggravating circumstances?

2.

Was it error for the jurors in the second trial to hear and view all of the evidence adduced at the first trial?

3.

Does the Supreme Court of Georgia's appellate review of Petitioner's death sentence comply with its statutory obligation under Georgia law?

4.

Does the submission of an additional statutory aggravating circumstance on a new trial for sentencing constitute double joepardy?

STATEMENT OF THE CASE

Eddie Spraggins, hereinafter referred to as the Petitioner, is under a sentence of death in the State of Georgia following his conviction in the Superior Court of Meriwether County in 1977, for the murder of Francis Coe in January of 1977. As a result of his conviction in 1977, an appeal was taken to the Supreme Court of Georgia. The Supreme Court of Georgia upheld Petitioner's conviction, but granted him a new trial as to sentencing because the Court found that the jurors had not been adequately instructed during the sentencing phase, in that the trial judge should have told the jurors that even though they found beyond a reasonable doubt the existence of any of the statutory aggravating circumstances put forth by the State, that they could nevertheless still impose a life sentence. Spraggins v. State, 240 Ga. 759, 243 S.E.2d 10 (1978).[1/] Later a new jury for resentencing was selected, and after being presented with the same evidence which the State presented earlier in 1977, that jury sentenced Petitioner to death for the murder of Ms. Coe. The Supreme Court of Georgia on appeal affirmed that sentence. Spraggins v. State, 243 Ga. 73, 252 S.E.2d 620 (1979). This Court on April 30, 1979, in an order by Justice Powell, extended the period of time in which the Petitioner could file for a writ of certiorari.

1/ Petitioner's co-defendant also received the death penalty, but his sentence to death was likewise vacated for the same reason as Petitioner. Davis v. State, 240 Ga. 763, 243 S.E.2d 12 (1978). Following a new trial for sentencing, co-defendant Davis received a death sentence again. Davis v. State, 242 Ga. 901, ___ S.E.2d ___ (1979); Petition for Certiorari No. 78-5032, presently before this Court.

STATEMENT OF THE FACTS

Around 1:30 p.m. on the snowy afternoon of January 31, 1977, Elsie Hutchinson thought it rather unusual that the back door to the home of her Meriwether County, Georgia, neighbor Francis Coe, was opened. Upon entering her neighbor's house Ms. Hutchinson discovered the gruesome sight of her neighbor lying on her bed. Ms. Hutchinson immediately left and went across to a neighbor's home to have the police called.

Georgia Bureau of Investigation Officer Bert Davis described the condition of the murder victim as follows:

> "On the bed on the right, Ms. Coe was lying with her head in the direction of the wall, and her feet down onto the floor. She was in a semi-nude condition, panties and pantyhose had been pulled down and were still attached to the left foot. She wore a slip which was pulled up here in the area of the breast and had on a green sweater which was open. There were numerous lacerations to the throat. It was cut just practically out. Further examination revealed a deep cut here in her eye which appeared to be a bruise type cut and not a slash. Numerous stab marks and slashes in the chest area and a slash mark on her breast, slash marks in the abdomen area on the left side, one approximately 5 inches. From the top of the vagina up through the navel, Ms. Coe was split open. The intestines were pulled from the stomach and lying on top of her stomach."

The autopsy which was later performed revealed that the cause of death was due to a loss of blood. There were several wounds to the body which caused the victim to bleed heavily, with the most severe stab wounds being in the upper abdomen and lower chest, including two in the upper abdomen which penetrated the heart. There was also evidence that there had been some manipulation to the victim's sexual organs. Particularly, there were two areas of injury in the vicinity of the vaginal opening. The second injury consisted of bruising around the vaginal orifice. The autopsy further indicated that there was a considerable amount of hemorrhaging around the urethera, as well as there being a small tear in the vaginal orifice.

During the course of the investigation the law enforcement officers were led to the yard of Petitioner's residence. A search of Petitioner's yard was occasioned by virtue of the fact that a neighbor on the night of the murder had seen something burning in Petitioner's back yard. With the consent of Petitioner's mother the law enforcement officers uncovered from a pile of ashes a zipper and cloth material which appeared to come from a jacket, as well as a flashlight which had recently been borrowed from the victim.

A Georgia Bureau of Investigation Agent later confronted Petitioner with the evidence which he had gathered to date on Ms. Coe's murder. After being advised of his rights Petitioner gave a statement. In that statement Petitioner implicated Freddie Davis by stating that Davis went to Francis Coe's house on Sunday, January 30, 1977. Petitioner stated that he had been talking about robbing Ms. Coe for some time. Petitioner went to the front door of the Coe residence while Davis remained at the back door. To gain entrance into Ms. Coe's house Petitioner used

excuse that he wanted to use the telephone. Upon gaining entrance to the house Petitioner forced Ms. Coe to open the back door, but she refused and started to scream. Petitioner proceeded to grab Ms. Coe from around the neck and opened the door in order to let co-defendant in. Petitioner then dragged Ms. Coe to the bedroom while at the same time keeping his hand over her mouth to keep her from screaming. Davis then told Petitioner to "Shut her up." In making this remark Davis handed Petitioner a knife, following which Petitioner proceeded to stab Ms. Coe as well as to cut her throat. Petitioner told the officer that Ms. Coe would not die, and that he kept cutting her, with Davis saying, "You got to finish her off." After eventually subduing Ms. Coe, Petitioner said that he wiped the blood off his hands and gave Davis back his knife. Davis then used the victim's flashlight in order to look for money. Petitioner later burned the windbreaker he was wearing behind his house. Davis returned the flashlight to Petitioner after they left Ms. Coe's house.

REASONS FOR NOT GRANTING THE WRIT

A. THE TRIAL COURT'S INSTRUCTIONS DURING THE SENTENCING PHASE OF THE TRIAL DO NOT SUFFER FROM ANY CONSTITUTIONAL DEFICIENCY AS URGED BY THE PETITIONER.

The Petitioner's first trial was specifically set aside because the trial judge failed to inform the jurors that even if they found the existence of a statutory aggravating circumstance they could nevertheless impose the death penalty and further, because the jury had not been instructed that they could consider mitigating circumstances in determining whether or not to impose the death penalty. Spraggins v. State, 240 Ga. 759 (1978). Now the Petitioner argues that the sentencing instructions are still defective in that the Court did not spell out the fact that the jurors were to consider the particular characteristics of the accused as well as once again failing to tell the jurors that they could nevertheless impose a life sentence even if they found beyond a reasonable doubt the existence of one of the statutory aggravating circumstances. The Supreme Court of Georgia initially granted Petitioner and his co-defendant a new trial because of the failure of the trial court to make this proposition clear to the jury. On retrial for sentencing this defect was cured. Spraggins v. State, 243 Ga. 73, 76 (1979). Petitioner has failed to show where the sentencing instructions on retrial suffer from any constitutional deficiency.[2/]

This Court has long stated that instructions should be viewed as a whole as they will not be judged in artifical isolation. Cupp v. Naughten, 414 U.S. 141 (1973). The Georgia Statute unlike

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2/ See Page 299 in Petitioner's Appendix D.

the statutes in Woodson v. North Carolina, 428 U.S. 280 (1976), and in Lockett v. Ohio, 438 U.S. 586 (1978), do not suffer from the constitutional deficiencies of having a jury impose the death penalty without considering mitigating circumstances, or limiting the mitigating circumstances. To the contrary, in Georgia the trial court fully informs the jurors that they may consider any mitigating factors, the decision as to what constitutes a mitigating factor or circumstance being left to the jurors. The Supreme Court of Georgia has made it clear that the trial court does not have to spell out what constitutes a mitigating circumstance, since the jurors are free in their own discretion to make that decision. See, Potts v. State, 241 Ga. 67, 243 S.E.2d 510 (1978); Spivey v. State, 241 Ga. 477, 246 S.E.2d 288 (1978); Thomas v. State, 240 Ga. 393, 242 S.E.2d 1 (1978). Sub judice, the jurors were given a full opportunity to consider mitigating circumstances which would include their consideration on any aspects of the Petitioner's character and record that they so desired. Spraggins v. State, supra, at p. 76.

The Petitioner also complains about the fact that the mitigating circumstances were not sufficiently defined or that examples of mitigating circumstances were not provided. As noted above, the Supreme Court of Georgia has held that it is not necessary for the trial court to specify or single out for the jurors what might be considered as a mitigating circumstance, since to do so might place a limitation on the jurors' discretion as to what they were to consider as a mitigating circumstance. If the Court were to spell out what the mitigating circumstances were in a particular case, then the petitioner would come back and state that the jurors had been unnecessarily limited to those mitigating circumstances, stating that there may have been others and giving examples of those. Clearly, the better practice, and the practice in Georgia,

is for the Court to inform the jurors that they may consider mitigating circumstances, and to define mitigating circumstances as being those circumstances which do not constitute a justification or excuse for the crime but which may be considered as extenuating or reducing the moral culpability or blame on the accused. The trial court's instruction on mitigation in this instance was clearly sufficient, and since the term mitigating circumstance was defined, no further elaboration was required because the word mitigating is a common term within a juror's understanding. See, United States v. Beasley, 519 F.2d 233 (5th Cir. 1975), rehng. den., 522 F.2d 1280 (5th Cir. 1976).

B. AT A TRIAL FOR RESENTENCING THE NEW JURORS ARE ENTITLED TO HEAR AND SEE ALL THE EVIDENCE FROM THE GUILT-INNOCENCE PHASE IN ORDER TO CONSIDER ITS IMPORT SO IT CAN CARRY OUT ITS SENTENCING ROLE.

Petitioner contends that it was error for the new jury empanelled to arrive at a sentence to see and hear the evidence which an earlier jury viewed. It is especially contended that photos of the murder victim should have been kept from the jury's view.

The admissibility of photographs in a murder case, particularly where those photographs may be unpleasant, rests with the sound discretion of the trial judge. See, United States v. Shoemaker, 542 F.2d 561 (10th Cir. 1976), cert. den., 429 U.S. 1004 (1976). Generally speaking the admissibility of photographs does not rise to constitutional dimensions. Talbot v. Nelson, 390 F.2d 801 (9th Cir. 1968), cert. den.. 393 U.S. 868 (1968). While the photographs in issue may be gruesome they are not inadmissible for that reason alone. United States v. Hoog, 504 F.2d 45 (8th Cir. 1974), cert. den., 420 U.S. 961 (1975). Petitioner has failed to show that the photographs of the person he murdered were so inflammatory or gruesome that their prejudicial effect outweighed their probative value. United States v. Hoog, supra.

The use of photographs of murder victims, regardless of how gruesome they may be, becomes extremely relevant when the State is seeking the death penalty, since they bear directly on the question as to whether the accused's acts fall within one of the statutory aggravating circumstances contained in the Georgia death penalty statute which the State may be putting forth at a later portion of the trial. In this case the photographs depicting the mutilated body of the victim were both relevant and material, and their

admission into evidence was not for the purposes of inflaming the minds and passions of the jury, nor did their introduction into evidence correspondingly cause the jury to impose the death penalty on Petitioner. These photographs were relevant to aid the jury in depicting the crime scene and to provide a more meaningful manner in which to apply the evidence to the case, and thus were admitted to assist the court and jury in better understanding the case for the purposes of sentencing. Even though Petitioner may have admitted that he injured a certain person, this does not preclude their admissibility into evidence to show the actual dismemberment which may have occurred at the Petitioner's hands. United States v. Morton, 493 F.2d 30 (9th Cir. 1974).

For this reason the petition for writ of certiorari should be denied.

C. THE SUPREME COURT OF GEORGIA HAS NOT ABANDONED ITS APPELLATE REVIEW PROCESS WHICH THIS COURT APPROVED OF IN GREGG[3/] NOR HAS IT PERMITTED ONE OF THE STATUTORY AGGRAVATING CIRCUMSTANCES UPON WHICH THE PETITIONER WAS SENTENCED TO DEATH TO BECOME A "CATCHALL."

The jury during the Petitioner's resentencing trial found that the Petitioner should be sentenced to death in that his crime encompassed two statutory aggravating circumstances contained in Georgia Laws 1973, pp. 159, 163; Ga. Code Ann. § 27-2534.1(2)(7).

The Petitioner states that the seventh aggravating circumstance, namely the offense of murder, was outrageously and wantonly vile, horrible and inhumane in that it involved a torture and depravity of mind on the part of the defendant or an aggravated battery to the victim is unconstitutional in that it has not been narrowly applied by the Supreme Court of Georgia, and as such is a catchall statutory aggravating circumstance.

Respondent submits that the germane issue in this matter is whether the Petitioner's sentence to death under the statutory aggravating circumstance is warranted by the evidence prior to any consideration being given to whether or not the Supreme Court of Georgia has not limited the application of this statutory aggravating circumstance. Based upon the statement of facts which is in the first portion of this brief, it cannot be said that under the circumstances of this case (the facts are so horrifying) that the murder was not outrageously and wantonly vile, horrible

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3/ Gregg v. Georgia, 428 U.S. 156 (1976).

and inhumane, or that it did not involve the torture and depravity of mind on the part of the defendant or an aggravated battery to the victim. Clearly, the cutting open of the abdominal area of the rape victim, causing to be exposed the visceral organs contained therein offends anyone's sense of decency, and clearly exhibits a depravity of mind on the part of the Petitioner, as well as an aggravated battery to the victim. Furthermore, the cases in which this statutory aggravating circumstance has been considered by the Georgia Supreme Court have been carefully reviewed and there are no cases in which the Supreme Court of Georgia has permitted this seventh statutory aggravating circumstance to become a general receptacle for upholding the death penalty. On the basis of the facts in this case the evidence was so clear and convincing that there was no necessity or a requirement that the jurors be informed as to what constituted torture, depravity of mind or an aggravated battery, since the evidence clearly established all of the requirements as contained in the seventh statutory aggravating circumstance. The facts in this case do not lead to the conclusion that the jurors were given unbridled discretion, since the facts were so wantonly vile that they almost defy description.

Lastly, the Supreme Court of Georgia has not abandoned its appellate role in considering similar cases in determining "whether the sentence to death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Ga. Code Ann. § 27-2537(c)(3).

Furthermore, the appendix of cases considered by the Supreme Court of Georgia in carrying out its appellate statutory review function clearly demonstrates that in the six years since the revised

death penalty was invoked in Georgia that they are considering cases of like circumstances wherein the death penalty for a similar statutory aggravating circumstance has been imposed. The conclusory allegations made by the Petitioner simply fail to establish that the Supreme Court of Georgia is not carrying out the review function which this Court earlier reviewed in Gregg v. Georgia, 428 U.S. 156 (1976), a procedure which was created and established by the General Assembly of Georgia.

The Petitioner's contentions surrounding the appellate review process in Georgia fail to demonstrate that certiorari in regard to the Petitioner's case is warranted.

D. THE SUBMISSION AT A RETRIAL FOR SENTENCING OF AN ADDITIONAL STATUTORY CIRCUMSTANCE DOES NOT CONSTITUTE DOUBLE JEOPARDY.

The Petitioner as noted earlier was granted a new trial on sentencing by the Supreme Court of Georgia. In the first trial the District Attorney submitted for the jurors' consideration the statutory aggravating circumstance that the murder was committed while the Petitioner was engaged in the commission of another capital felony, that being rape. Ga. Code Ann. § 27-2434.1(2). At the resentencing trial the seventh statutory aggravating circumstance, namely that the offense of murder was outrageously or wantonly vile, horrible or inhumane in that it involved torture, depravity of mind, or an aggravated battery to the victim was also included for the jurors' consideration. Petitioner argues that this constitutes double jeopardy, in that he was not on notice as to that circumstance at the first trial, and as such the State should be precluded from putting forth an additional statutory aggravating circumstance based upon the same evidence at a subsequent trial for resentencing. The Supreme Court of Georgia found that double jeopardy was not involved, since the evidence at the first trial was identical to that which was presented in the second trial, and consequently the Petitioner was on notice since the evidence was the same as that in the first trial. Spraggins v. State, supra.

Petitioner's double jeopardy theory seems to be that since the jurors in the first trial were not asked to consider the seventh statutory aggravating circumstance, that in essence the failure to submit that statutory aggravating circumstance at his first trial constitutes an acquittal thereof. Since the first seventh aggravating circumstance was not submitted to the

jury it cannot be said that he was acquitted thereof, and as such the double jeopardy argument must fail. Petitioner would seemingly rely upon the holding in the case of Ashe v. Swenson, 397 U.S. 436 (1970), in support of his double jeopardy provision. Ashe, supra, is inapplicable in that, in that case the petitioner was charged with six counts of armed robbery arising out of one transaction or occurrence. There the jury acquitted on one count, and as such the State was constitutionally prohibited from relitigating the issue again as to other robbery victims. In this case the Petitioner was never made to run the gauntlet of having a jury consider the seventh statutory aggravating circumstance.

Neither can it be said that the submission of a second statutory aggravating circumstance at his tiral for resentencing was to have a chilling effect as a result of the Petitioner having earlier exercised his appellate rights. This contention has no basis at all, since the Petitioner in Georgia is entitled as a matter of law to an automatic appeal from any conviction in which he receives the death penalty. Ga. Laws 1973, pp. 159-165; Ga. Code Ann. § 27-2537(a).

Neither is there any evidence in this matter to indicate that the District Attorney's action in submitting an additional statutory aggravating circumstance for the jury's consideration constitutes vindictiveness. See, North Carolina v. Pearce, 395 U.S. 711 (1969). Since the Petitioner did not receive a greater sentence on retrial, but received the same sentence he earlier received, his retrial did not subject him to a greater punishment than that which was imposed at the first trial. Further, because the jurors were not called upon to consider the additional statutory aggravating circumstance in the first trial the submission of same in the second trial does not constitute double jeopardy. See, Price v. Georgia, 398 U.S. 323 (1970). See also, Bordenkircher v. Hayes, 434 U.S. 357 (1978).

For these reasons, the submission during the penalty phase at the Petitioner's second trial of a statutory aggravating circumstance not considered at the first trial does not constitute double jeopardy.

CONCLUSION

This Court should refuse to grant a writ of certiorari because no sufficient reasons for review have been set forth by Petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John C. Walden, Attorney of Record for Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served true and correct copies of the Brief for Respondent in Opposition upon the Petitioner's attorney by depositing a copy of same in the United States mail, with proper address and adequate postage to:

Mr. Taylor Briggs
LeBoeuf, Lamb, Leiby & MacRae
140 Broadway
New York, New York 10005

This 6th day of August, 1979.

JOHN C. WALDEN

IN THE SUPREME COURT OF THE
UNITED STATES

NO. 78-5032

EDDIE SPRAGGINS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF
CERTIORARI TO THE SUPREME
COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

STATE OF GEORGIA
DEPARTMENT OF LAW
ARTHUR K. BOLTON
ATTORNEY GENERAL

Supreme Court, U.S.
FILED
AUG 20 1979
MICHAEL RODAK, JR., CLERK

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-5032

- - - - - - - - - - - - - - - - -X

EDDIE SPRAGGINS, :

Petitioner, :

-against- :

STATE OF GEORGIA, :

Respondent. :

- - - - - - - - - - - - - - - - -X

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

Taylor R. Briggs
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-5032

- x

EDDIE SPRAGGINS,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

- x

PRELIMINARY STATEMENT

Pursuant to Rule 24(4) of the Supreme Court Rules, Petitioner, Eddie Spraggins, hereby replies to the Brief for the Respondent in Opposition, filed August 6, 1979. Respondent's Brief in Opposition to Petitioner's Petition for Writ of Certiorari, filed July 6, 1979 ("Petition") avoids certain issues raised in the Petition. Therefore, Petitioner will herein respond to the omissions of the Brief in Opposition so that the real issues underlying this Petition will not be obfuscated.

DISCUSSION

1. The Effect of the Sentencing Judge's Written Charge Was to Preclude the Jury's Consideration of Mitigating Circumstances

A major point made in the Petition was that the substantial disparity between the sentencing judge's oral

and written charges effectively constituted a violation of Petitioner's constituional right to due process of law. See, Petition, at 9-15. Respondent's brief did not even mention this difference, despite the fact that the Georgia statute found constitutional by this Court in Gregg v. Georgia, 428 U.S. 153 (1978), requires an identity of content in the oral and written charges. Ga. Code Ann. §27-2534.1(c).

As was noted in the Petition, the sentencing judge's oral charges informed the jury that mitigating circumstances could be considered and that even if a statutory aggravating circumstance (necessary for the death sentence pursuant Ga. Code Ann. §27-2534.1(b)) existed, a life sentence could be recommended. The inclusion of these instructions in the oral charge vested it with a constitutionality that, in the opinion of this Court and the Georgia Supreme Court, would not have obtained in their absence.* In contrast, the judge's written charge, which the jury members carried into the jury room, failed to instruct the jury both to consider mitigating circumstances and that a life sentence could be

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* See, e.g., Lockett v. Ohio, 438 U.S. 586 (1978) and the five death sentence cases decided by this Court in July, 1976 (Gregg v. Georgia 428 U.S. 153; Profitt v. Florida, 428 U.S. 292; Jurek v. Texas, 428 U.S. 262; Woodson v. North Carloina, 428 U.S. 280; and Roberts v. Louisiana, 428 U.S. 325), which establish the principle that a statutory scheme must allow consideration of mitigating circumstances to be constitutional. See also, Fleming v. State, 240 Ga. 142, 240 S.E. 2d 37 (1977) and Hawes v. State, 240 Ga. 327, 240 S.E. 2d 833 (1977), in which decisions the Georgia Supreme Court determined that in order for mitigating circumstances to be effectively considered, the jury must be informed that they can recommend life even if aggravating circumstances were found to exist.

recommended even if they found aggravating circumstances. Petitioner contends that the failure of the written charge to establish the propriety of considering mitigating circumstances effectively undercut the presence of those instructions in the oral charge and thereby denied petitioner his due process right to have mitigating circumstances considered.

Respondent's Brief ignores the distinction between the written and oral charges and makes vague reference to this Court's decision in Capp v. Naughten, 414 U.S. 141 (1973), which in Respondent's words held that "instructions should be viewed as a whole as they will not be judged in artificial isolation." See, Respondent's Brief at 7. Petitioner respectfully submits that in jury charges, where the written word and oral speech clash as was the case here, the respective impact upon the jury is not "artificial".* It is sheer fantasy to suggest that the judge's proper oral charge would retain its vigor in the face of a defective written charge which was on the jury's table while the deliberations progressed. Capp v. Naughten, supra, applies to this case only by its distinguishability. The written charge, constitutionally deficient by all standards, obviously governed the jury's determination; the death sentence should accordingly be overturned.

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* In Capp v. Naughten, the Court ruled that the mere sequence of oral instructions should not be determinative of whether a latter paragraph destroys the significance of a former paragraph.

2. The Vagueness and Overbreadth of the Statutory Aggravating Circumstance Found Present In This Case Encourages Use of Inflammatory Evidence Designed to Elicit Subjective Feelings of Visceral Repulsion Which are Necessarily Capricious and Arbitrary.

The Petition argued that the pernicious combination of the Georgia statute,* which by its seventh aggravating circumstance authorizes the death sentence in almost any case, and the introduction of inflammatory evidence, which that statutory provision invites,** resulted in the capricious, arbitrary and freakish imposition of a death sentence in this case. See, Petition, at 15-23. Respondent's Brief fails to address this point directly.

Instead, Respondent harps on the "facts" of the crime and seems to believe that these facts should outweigh the constitutional requirements which attend to the applicable statute and the trial. Respondent labors under the misapprehension that the "germane issue" in the matter of whether

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* In the case at bar, the sentencing jury found that the seventh aggravating circumstance in the Georgia statutory scheme (Ga. Code Ann. §27-253.4.1(b)(7)) was present:

> "The offense of Murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture, depravity of mind on the part of the defendant, or an aggravated battery to the victim."

The jury did not find that the Petitioner should be sentenced to death "in that his crime encompassed two statutory aggravating circumstances," as the Respondent suggests in its Brief in Opposition, at 12 (emphasis added).

** Respondent's Brief in Opposition admits that inflammatory evidence, such as gruesome photographs of scenes already depicted by testimony is relevant because it "bear[s] directly on the question as to whether the accused's acts fall within one of the statutory aggravating circumstances [i.e., the seventh circumstance, Ga. Code Ann. §27-2534.1(2)(7)]." Respondent's Brief in Opposition at 10.

the seventh aggravating circumstance is sufficiently precise "is whether the Petitioner's sentence to death under the statutory aggravating circumstance is warranted by the evidence" in this particular case. See, Brief in Opposition, at 12. Respondent further states that if the evidence is sufficient in that the facts would offend "anyone's sense of decency" or are "so watonly vile that they almost defy description" (Brief in Opposition, at 13), the Court needn't consider whether the Supreme Court of Georgia has given any definition to the statute's seventh aggravating circumstance.

Petitioner adamantly disagrees. An unconstitutionally vague statute cannot be the instrument of sentencing a man to death. It further cannot gain constitutional dignity because the facts in a particular case may arguably satisfy the most extreme meaning of its broad language. Petitioner contends that the issue is whether the jury knew by what standards it was objectively and impassionately to measure the facts before it. In Georgia, there has been no articulation of such standards, and therefore the Petitioner's death sentence must be overturned.

Further, tne invidiousness of the corollary to the vagueness of this statute, i.e., that it invites inflammatory evidence designed to elicit emotional revulsion, was entirely ignored by Respondent in its Brief in Opposition. Petitioner submits that a statute like Georgia's, which fosters the use of inflammatory evidence, is totally devoid of that vigilence against arbitrariness and capriciousness which was mandated for death sentence statutes by this Court's decision in Gregg v. Georgia, 428 U.S. at 189.

CONCLUSION

For the foregoing reasons, Respondent's Brief in Opposition to the Petition for Writ of Certiorari states no valid grounds for why the Writ schould not issue. Accordingly, Petitioner prays that the Court will issue a Writ of Certiorari to review the judgement and opinion of the Georgia Surpreme Court.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-5032

EDDIE SPRAGGINS,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

AFFIDAVIT OF SERVICE

SAMUEL J. ABATE, JR., being duly sworn, deposes and says that:

He is over 18 years of age and is employed by the firm of LeBoeuf, Lamb, Leiby & MacRae, 140 Broadway, New York, New York 10005.

On the 20th day of August, 1979, your deponent caused the foregoing Reply to Brief for the Respondent in Opposition to be served upon the following by depositing true copies thereof enclosed in securely sealed wrappers in a United States mailbox with first class postage fully prepaid thereon, and addressed as set forth below:

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Samuel J. Abate, Jr.
SAMUEL J. ABATE, JR.

Sworn to before me this

20th day of August, 1979.

Maria Havelka
Notary Public

MARIA HAVELKA
Notary Public, State of New York
No. 41-4637976
Qualified in Queens County
Commission Expires March 30, 1980